Service Date: August 30, 1995

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE MONTANA PUBLIC SERVICE COMMISSION, Investigation of the Regulatory Status of Other Common Carriers and Contemplated Rulemaking.	)))))	UTILITY DIVISION DOCKET NO. 94.2.8 ORDER NO. 5778g
IN THE MATTER OF THE MONTANA PUBLIC SERVICE COMMISSION, Interexchange Telecommunications Market Monitoring Investigation.	))))	UTILITY DIVISION DOCKET NO. 92.11.66 ORDER NO. 5664d

FINAL ORDER

Introduction

1. Incidental to the merits of above-entitled matters, on January 12, 1995, the Public Service Commission (PSC) issued an "Order to Show Cause and Notice of Hearing on Certain Proprietary Information," the issue being whether certain information (identified below) filed and protected as confidential under protective orders (Order No. 5778 in Docket No. 94.2.8 and Order No. 5664a in Docket No. 92.11.66) should be released from protection and designated as public information.

2. The information in question generally relates to market share and specific data relating to market share for interexchange carriers (IXC's, which include AT&T and the Other Common Carriers, MCI, Sprint, TRI, and American Sharecom) and specifically includes:

(for Docket No. 94.2.8)

a. information submitted by AT&T in response to MCC-15 (data request), relating to market share and requesting support for a market share calculation in prefiled testimony;

b. information submitted by AT&T in response to PSC-65, relating to market share and requesting data relating to the number of customers served, billed minutes of use, related revenues, all by specific market and time periods of use for a designated calendar year;

c. information submitted by AT&T in response to PSC-69, relating to residential loads and requesting a probability distribution curve demonstrating minutes of use by each 25 percent block of customers and how customers are targeted for sales promotions;

(for Docket No. 92.11.66)

d. information required to be provided by Order No. 5664b, para. 3(b) (later referred to as "3(b) information"), on the combined total intrastate access minutes of use utilized by IXC's and resellers, divided by feature group and end office type;

e. information required to be provided by Order No. 5664b, para. 3(d) ("3(d) information"), requesting the number and percentage of customers presubscribed to each IXC or reseller in each LEC equal access office and a summation of the total number of customers presubscribed to each IXC or reseller, separately for residential and non-residential categories; and

f. information required to be provided by Order No. 5664b, para. 4(a) ("4(a) information"), on IXC's total billed minutes of use divided into categories "MTS" and "other."

3. AT&T Communications of the Mountain States, Inc. (AT&T), MCI Telecommunications Corporation (MCI), Sprint Communications Company L.P. (Sprint), TRI Touch America (TRI), US West, Inc. (USW, in context, is not an IXC), and Northwest Telephone Systems, Inc., dba PTI Communications (PTI, in context, also not an IXC), filed responses to the Order. GTE (Citizens Telecommunications Company of Montana, not an IXC) and American Sharecom (an IXC) did not respond. An *in camera* hearing (customary for discussion of proprietary information) was held on February 9, 1995, at the PSC offices, where AT&T and MCI appeared and presented testimony.

Summary of Written Responses Received

4. All IXC's filing comments agree that the 3(b) information can be released from protection. The reasons vary. AT&T comments that the potential injurious impact of public disclosure of the 3(b) information is now negligible. MCI comments that the 3(b) information is not proprietary. Sprint simply states that it does not object to release of the 3(b) information, with the

qualification that it does not see any public purpose or benefit in disclosure. TRI states that it no longer views the 3(b) information as proprietary. In regard to all of the other information the IXC parties oppose removal of the proprietary designation. Their arguments are similar.

5. AT&T comments that the information is confidential and should remain protected. It argues that the reason for continued protection is that its competition could use the information to their benefit and to its detriment. It also comments that the consuming public will have no benefit of having the information available to it. AT&T argues that the information on market share and supporting details and data is trade secret as it includes information and compilations of information which derive independent economic value, potential or actual, by not being generally known or readily ascertainable by proper means by others who can benefit from its disclosure and use (referencing generally, Section 30-14-402(4), MCA, defining "trade secrets"). AT&T points out that Mountain States (complete citation later), requires the PSC to afford protection of trade secrets beyond the extent such are necessary for regulation. According to AT&T the market share and related information can be used by competition in their marketing efforts and strategic planning and be destructive to AT&T's business success, service innovation, marketing creativity, and good business acumen.

6. MCI agrees with AT&T that the information is trade secret. MCI also comments that it can identify no consumer interest in obtaining the information and cannot see how disclosure would further the public interest or the interest of consumers. In addition, MCI comments that disclosure of the information might actually do more harm than good because disclosure would be destructively anti-competitive. To MCI disclosure of the information will benefit only its competitors. MCI also comments that disclosure would violate expectations concerning how the PSC initially intended to use the information in the dockets and may impede or chill willingness to supply information in the future.

7. Sprint comments that the public interest does not require the release of the information and neither the parties nor the public has requested release. Sprint, like AT&T and MCI, is not aware of any rationale justifying disclosure of this competitive market information, information not otherwise available to competitors but for its compilation and submission to the PSC. Sprint agrees with AT&T and MCI that the protected information is trade secret, valuable only

to competitors for purposes of competing in marketing and developing marketing strategy. Sprint also comments that some of the information supplied by AT&T is Sprint-specific and was provided to AT&T by Sprint under an agreement of confidentiality and should be preserved as such.

8. TRI states that it did not submit information that it considers proprietary in Docket No. 94.2.8 (this may be true for all IXC's, except AT&T), but did submit such information in satisfying the requirements of Docket No. 92.11.66, Order No. 5664b. Although it appears to state that it no longer considers any of that information proprietary, it comments that only the 3(d) information is protectible, essentially for the same reasons expressed by AT&T and others (public disclosure undermines the competitive nature of the business and would serve no benefit to the consumer). In regard to this, TRI explains that its customer numbers for those presubcribed by exchange is sensitive information which could be used by competitors in marketing and strategic planning (primarily in targeting attractive areas and customer concentrations for marketing) and thereby undermine the competitive nature of the business.

9. USW comments that, although the information that it has submitted is not proprietary to USW, it is proprietary to its customer IXC's (who have requested that USW treat the information as proprietary) and it cannot release the information from protection without its customers' consent or a PSC order. USW suggests that the PSC determine justification for the proprietary nature of the information from the comments of the affected IXC's.

10. PTI comments that the 3(b) and 3(d) information is the only information at issue for it. It does not object to the release of the 3(b) information. PTI, like USW, does not assert a proprietary interest in the 3(d) information, but understands that the IXC's affected do and feels that it cannot release the information without the IXC's approval or PSC order.

Summary of Hearing

11. AT&T and MCI appeared at the February 9, 1995, hearing. AT&T submitted evidence through witness Lois A. Hedg-Peth. Both AT&T and MCI made a closing statement or oral argument. Hedg-Peth testified that the AT&T information in question is not available to the public or to competition and is treated as closely-held and proprietary by AT&T. She testified that the information does not include data of beneficial use to consumers. She testified that the information can demonstrate trends of interest to competition and be useful in determining whether particular marketing strategies were successful or not. She testified that the information's demonstrated increases and decreases in market share are business intelligence and can be used to verify the success or failures of marketing strategies allowing competition to change, eliminate, or mimic strategies as the information might establish is advisable. She testified that the information would allow competition to target mailings and telemarket efforts and allow competition to follow the lead as to what efforts have been successful without doing the initial research or investigation likely done by the leader initially. She testified that the information that includes customers by amount billed would be useful for the competition in targeting particular plans that might fit that customers billing pattern.

Analysis

12. In its customary application, protection of "trade secrets" by the PSC is through protective orders which are based on case law, Mountain States Telephone and Telegraph Company, et al. v. Department of Public Service Regulation, et al., 194 Mont. 277, 634 P.2d 181, 38 St. Rptr. 1497 (1981), and statutory law, ' 69-3-105(2), MCA (enacted in 1987, several years after Mountain States), and that statute's referenced '. 30-14-402, MCA, defining "trade secrets." The IXC parties reference and discuss this law in their filed comments and oral arguments.

13. In Mountain States, the Montana Supreme Court reviewed a PSC denial of a regulated utility's (Mountain Bell) request for a protective order to preserve the confidentiality of certain trade secret proprietary and confidential business information claimed by the utility to be a

valuable property right. The utility was willing to provide the information under protection from disclosure.

14. The PSC denied protection on the grounds that the utility, as a corporation, was not entitled to the protection of the individual privacy exception under Art. II, sec. 9, Mont. Const. of 1972, and that the parties of record (and the public) should be able to examine any and all documents in a rate proceeding before the PSC, pursuant to the public's "right to know."

15. On judicial review, the District Court disagreed with the PSC, but through other reasoning affirmed the result. It held that "trade secrets" are property subject to constitutional protection. However, it held that the public utility, by applying for rate relief, because of its regulated nature, was required to divulge the information to the PSC and the public.

16. On appeal, the Supreme Court disagreed with the PSC and the district court. It reasoned (agreeing with the district court on this point) that the trade secret information in issue was a "species" of property entitled to constitutional protection. It reasoned that to interpret the relevant statutes (PSC and general freedom of information statutes, including Sections 69-3-105, as then existing, and 2-6-102, MCA, on public records) and Art II, sec. 9, Mont. Const., as the PSC did (and the district court, with some modification also did) would violate the equal protection clause of the federal constitution and the due process clauses of both the federal and state constitutions. Mountain States, 634 P.2d at 185.

17. The court held that "compelled disclosure," where necessary to the proper exercise of PSC or Montana Consumer Counsel (MCC) duties did not violate either the state or federal constitutions. Id., at 186. However, the court held that "compelled disclosure of the information to all of the public [including competitors]" did violate the constitutions. Id., 634 P.2d at 186. So, the problem with rights to protection of the information was not in divulging it to the PSC (or MCC or other parties) under certain controlled conditions, but in disclosure to the public. Hence, an order protecting from such public disclosure was constitutionally mandated.

18. Mountain States provided an appendix containing an actual "protective order" and compelled the PSC to apply it in the underlying proceeding (actually the protective order had been issued to the PSC by the court several months prior to the opinion, as an interlocutory order). This Mountain States protective order has been used as a basis for PSC protective orders since. (As a

point of caution, a part of the opinion's protective order was apparently misprinted in both the Montana Reports and State Reporter, but the Pacific Reporter version is accurate.)

19. The Court commented that its "protective order" is a result of the balancing between "privacy" (the Court interpreted "trade secret" property rights as privacy-related rights, but not necessarily in the context of Art. II, sec. 9) and the right to know. (It is important to note that the Court did the balancing, it did not create a method for balancing or a test to be applied in balancing.) The Court stated that the order gives the PSC, the MCC, and any party participating, the right to receive the information subject to provisions which protect confidentiality. Id., 634 P.2d at 187 and 189. "Further dissemination [under protective order]," the Court stated, is left "to the discretion of the PSC, to be released, or not released, in the exercise by the PSC of its ratemaking functions." Id., 634 P.2d at 189. Therefore, in the discretion of the PSC, others ("citizens") may have access under protective order if the underlying interest relates to the ratemaking function of the PSC.

20. Montana statutory law permits the PSC, in regulating public utilities, to order protection of trade secrets:

> 69-3-105. Access to commission records and reports--protective order. (1) Except as provided in subsection (2), the reports, records, accounts, files, papers, and memoranda of every nature in the possession of the commission are open to the public at reasonable times, subject to the exception that when the commission considers it necessary, in the interest of the public, it may withhold from the public any facts or information in its possession for a period of not more than 90 days after the acquisition of the facts or information.
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> (2) The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory functions.

21. Subsection (2) and its referencing language in subsection (1) were added by the Montana Legislature in 1987, several years after the Mountain States court decision. See, Sec. 1, ch. 77, L. 1987. Section 69-3-105, MCA's, referenced definition of "trade secret" is found in Section 30-14-402, MCA. In relevant part it provides:

> 30-14-402. Definitions. As used in this part [Uniform Trade Secrets Act], unless the context requires otherwise, the following definitions apply:
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> ....

> (4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:
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> (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

22. These statutes do not appear to present a great deal of complication necessitating elaborate discussion. The statutes are clear and contain no ambiguity. They simply provide a definition of "trade secret" and that the PSC can protect trade secrets by proper protective order. However, implementing the statutes does require some additional consideration necessitating further discussion in light of Mountain States.

23. Mountain States, unlike the statute, is not permissive. It mandates that, although needed for regulatory purposes, information that would through unrestricted agency, party, or public access, reduce or eliminate an economic value held by the "owner" of that information must be protected. This "certain information" having economic value is "trade secret," sometimes also referred to as "confidential business information," "privileged commercial or financial information," "proprietary information," or some similar terminology.

24. Without doubt, protection of confidential information is serious. All persons having access to confidential information should clearly understand that negligent, reckless, or purposeful disclosure of protected information is an actionable violation of the laws establishing rights in the "proprietors" of the information and will subject the "irresponsible" person (and potentially the person's employer) to a claim for damages. Mountain States, itself, references Tri-Tron Intern. v. Velto, 525 F.2d 432 (9th Cir. 1975), upholding a Montana Federal District Court decision recognizing, as a compensable tort, the deprivation of a trade secret through a breach of faith. Mountain States, 634 P.2d at 185-186.

25. The parties' principal objection to release of the information in question is that it can be used by competitors in developing market strategies. It may be thought that the information would actually serve a useful public purpose. The competitors having the information in question

available to them could concentrate marketing on areas then known to have potential, copy proven successful marketing campaigns, or abandon those appearing unsuccessful. The IXC parties disagree with this, commenting that such is actually anti-competitive and may, in the long term, have adverse effects on consumers.

26. However, whether disclosure would increase competition or be anti-competitive need not be decided. Whether information that is trade secret would serve some useful public purpose if disclosed is not a valid factor in considering whether information should be protected. If information meets the definition of trade secret the PSC is obligated to protect it from disclosure (if requested to do so) to any extent beyond that necessary for the PSC (and participating parties) to fulfill the PSC's regulatory responsibilities.

27. The market share information and related details and data meets the definition of "trade secret." As the comments and evidence demonstrates market share and related information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. Being trade secret, market share information should be protected.

ORDER

All of above which can be properly be considered an Order and which should be so considered to preserve the integrity of this Order are incorporated herein as an Order.

All pending motions, objections, and arguments not specifically ruled on in this Order are denied to the extent that such denial is consistent with this Order.

IT IS HEREBY ORDERED that the information in question, with the exception of the 3(b) information, shall remain confidential information subject to the applicable governing protective orders.

Done and dated this 22nd day of August, 1995, by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
NANCY MCCAFFREE, Chair

_____
DAVE FISHER, Vice Chair

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, Commissioner

_____
BOB ROWE, Commissioner
(Voting to Dissent, Attached)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

DISSENT OF COMMISSIONER ROWE
OCC DOCKET NO. 94.2.8, ORDER NO. 5778g

The majority opinion fails even to address one of the two basic purposes of disclosure, allowing citizens to determine the correctness of government actions affecting them. The Montana Supreme Court crafted a procedure for handling trade secrets intended both to allow public agencies to perform their duties (using protective orders where necessary) *"and at the same time disclose to the public all information required to enable citizens to determine the propriety of governmental actions affecting them."* Mtn. States Tele. v. Dept of Public Service Reg., 194 Mont. 277, 285-6 (1981).[1] Citizens should be able to evaluate the soundness of their government's decisions.

In this case, the Commission removed the only remaining control on the price of intrastate interLATA telephone calls, mandatory flow through of carrier access charge reductions. That action has significant potential to affect the rates paid by Montana telephone customers.[2]

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[1] Industry also failed to address this purpose of disclosure, arguing instead only that consumers would not be able to use any information disclosed to their benefit in the marketplace, not a purpose mentioned in Mountain States.

[2] Access charges are paid by long distance phone companies to local phone companies. Previously, the Commission had required that reductions in access charges be passed on to the benefit of long distance customers. To date, the Montana PSC has ordered over $6 million in access charge reductions, so the amount of money at issue for long distance customers is significant.

The Commission's action is premised on a particular view of the intrastate long distance market, one in which residential customers are the beneficiaries of vigorous price and service competition.[3] This is the picture also painted by the dominant long distance company. This view, on which the soundness of the Commission's decision entirely hinges, is directly contrary to the data produced in several years of study by the Commission. Because the data is proprietary, the affected public has no way to evaluate the correctness of the Commission's decision to eliminate the remaining rate protection.[4]

There is no question that trade secrets must be protected. The path of least resistance, by which material is routinely granted protective status subject to later challenge, serves the important purpose of allowing information to flow to the Commission and parties, usually without undue delay. I also do not dismiss the benefits of utility confidence that when information is provided as proprietary its confidentiality will be respected. However, when information becomes relevant to evaluating a public decision, the Commission and parties must more carefully scrutinize whether the information does derive "independent economic value ... from not being generally known," (Section 30-14-402, MCA) and if it does, whether it is possible to make some parts of it known without diluting that value.

Contrary to the majority's assertion, the trade secret statutes are not entirely "clear and contain no ambiguity." (Paragraph 22.) Mountain States did not define or set out a procedure for determining what matter constitutes trade secrets.[5] Over the years, parties before the PSC have

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[3] Order 5778d, paragraphs 14 through 19, 38 and 41 in particular make assertions about the competitive nature of the intrastate long distance market. Those assertions are contravened by the evidence, as established in my dissent, note 21 at page 11.

[4] Citing but not quoting proprietary data, my dissent argued that while compe-tition did exist in some segments of the intrastate long distance market (e.g. high volume customers subscribing to discount plans), most of the market was not effectively competitive. Rather, it was characterized by one clearly dominant firm and two much smaller firms which followed the price leadership of the larger firm. All the other carriers combined had cap-tured only a tiny fraction of the interstate market. Requiring flow through of access charge reductions forced prices down to the great majority of low volume long distance customers while allowing competition for the attractive high volume users.

[5] "We are given no record here as to what it is we have categorized as 'trade secret';

asserted "trade secret" status for information which was later recognized to derive no independent economic value from its secrecy. The Commission should better articulate the standard by which it will measure trade secrets. More rigorous models for making this determination do exist.[6]

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that is, whether it is an idea, design, system or implement, or combination of these." Mountain States at 283.

[6] Some other state utility commissions have expressly referred to the rules of civil procedure, undertaking the following analysis. Montana Rule of Civil Procedure 26(c)(7) provides protection for trade secrets in civil discovery. As in most states, the Mon-tana rule tracks the federal rule. Under the federal rule, the party seeking confidentiality must first make a particularized showing that the information it seeks to protect is a trade secret or otherwise confidential. Among the factors considered are (1) the extent to which the information is known by persons outside the applicant's business; (2) the extent the information is known by employees of the applicant's business; (3) measures taken by the applicant to guard secrecy; (4) the value of the information to the applicant and its compet-itors; (5) the amount of money or effort expended to develop the information; and (6) the ease or difficulty with which the information could be properly acquired or developed by others. Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 28 (E.D.Mich. 1981). Second, the party seeking protection must establish "good cause" by showing that disclosure "will work a clearly defined and serious injury." Conclusory statements will not suffice. Id.; Zenith Radio Corp. v. Matsushita Elec. Indus., 529 F. Supp. 866, 891 (E.D.Pa.

1981). Mountain States cites Rule 26(c)(7) M.R.Civ.P. and cases applying it for the determination that trade secrets are protectible property. 194 Mont. at 283-4.

At hearing, AT&T did testify to the care with which it handled much of the information, and the uses to which that information might conceivably be put. Because no consumer party participated, that position was not subject to any meaningful challenge. (This is yet another weakness of the current system.) On balance, AT&T appears to have shown that it treated the information as trade secrets.

Whether divulging or not divulging the information would confer actual value is a matter of greater speculation. Much of the information at issue is similar to information made public for other purposes. All of the information is now several years old. While relevant for policymaking, it is certainly less valuable for marketing or other competitive decisions.[7] I would address these concerns by issuing a list of specific items relevant to evaluating the Commission's actions, and inviting comment on whether these items should be made public. The much more complete and valuable raw data, or even charts and graphs compiled by the Commission from reported data, could be kept proprietary. Among the items which would be included on such a list (for comment before distributing the actual figures) could be:

1. The dominant carrier's share of customers presubscribing to a long distance carrier through 1993.
2. The trend (increasing or decreasing) in the dominant carrier's share of customers presubscribing through 1993.
3. The share of customers presubscribing for the second and third place carriers through 1993.
4. The trend in the second and third place carriers' share of customers presubscribing through 1993.
5. The combined share of the three largest carriers.

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[7] AT&T's witness agreed that current information would be more valuable than information one or two years old.

6. The percent of lines presubscribed to the dominant carrier in 1991, 1992, and 1993, and the trend from 1991 to 1993.
7. The number (in millions) of billed minutes of use for residential message toll service (basic long distance) commercial message toll service, and all other services.[8]
8. Average residential consumption of intrastate interLATA toll, together with a general breakout of the percent of customers accounting for percentages of revenue, for 1993.

Others would identify discrete items they believed were important in evaluating the Commission's decision.

Unlike a blanket grant of protective status, this approach would have both safeguarded trade secrets and recognized citizens' right to evaluate decisions affecting them. It would have done so through narrow disclosure consistent with legitimate industry concerns, coupled with the additional protection of a final pre-disclosure opportunity to comment.

RESPECTFULLY SUBMITTED this ____ day of August, 1995.

_____
BOB ROWE
Commissioner

[8] "All other services" includes the various calling plans, which are the focus of most existing competition. This would be proposed for disclosure in the aggregate (as one number) to prevent any competitive benefit from publication of 1993 figures.